2000

Bonnie Loffredo and Donald A. Westenskow v. Scott W. Holt : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BONNIE LOFFREDO and DONALD A. WESTENSKOW,	:	
Plaintiff/Appellees,	:	
vs.	:	
SCOTT W. HOLT,	:	Case No. 20000170
Defendant/Appellant.	:	Priority 15

BRIEF OF APPELLANT
(Oral Argument Requested)

Appeal from the Judgment of the
First District Court of
Box Elder County, State of Utah
THE HONORABLE THOMAS L. WILMORE
DISTRICT COURT JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

BONNIE LOFFREDO and DONALD A. WESTENSKOW, Plaintiffs/Appellees, vs. SCOTT W. HOLT, Defendant/Appellant.	:	**BRIEF OF APPELLANT** Case No. 20000170

The Appellant, Scott Holt, pursuant to Rule 24 of the Utah Rules of Appellate Procedure, submits this Appeal Brief.

JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction pursuant to Utah Code Annotated §78-2-2(1953), as amended. The order appealed from is a final order disposing of all claims of the parties.

ISSUES PRESENTED ON APPEAL

1. Was the Defendant entitled to payment of attorney's fees by Plaintiff Westenskow without an express written contingent fee agreement?
2. Did the Defendant fail to file an affidavit of attorney's fees in a timely manner and was the trial court correct in then denying him an award of attorney's fees against Plaintiff Westenskow?
3. Is Defendant entitled to attorney's fees and costs as against Loffredo, under the written fee agreement with Loffredo, for prevailing on Loffredo's claims against Defendant?
4. Was the trial court's award of pre-judgment interest in favor of Plaintiff/Appellant Westenskow appropriate?

STANDARD OF APPELLATE REVIEW

The granting of a Motion for Summary Judgment by the trial court is appropriate only when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c), Higgins v. County, 855 P.2d 235 (Utah 1984). In reviewing a grant of summary judgment, the Court views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. E.g., Smith v.

Batchelor, 832 P.2d 467, 468 (Utah 1992); Rollins v. Petersen, 813 P.2d 1156, 1158 (Utah 1991); Utah State Coalition of Senior Citizens v. Utah Power & Light, 776 P.2d 632, 634 (Utah 1989).

The Supreme Court reviews the trial court's conclusions of law for correctness, granting them no deference. Ferree v. State, 784 P.2d 149, 151 (Utah 1989); White v. Desselhorst, 879 P.2d 1371, 1374 (Utah 1994). On appeal, the Supreme Court determines only whether the trial court erred in applying the governing law and whether the "trial court correctly held that there were no disputed issues of material fact". Id. In reviewing the trial court's decision, the Supreme Court views the facts in the light most favorable to the non-moving party and will find summary judgment proper only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Utah Rules of Civ. P. 56(c). Drysdale v. Ford Motor Company, 947 P.2d 678, 680 (Utah 1997).

DETERMINATIVE AUTHORITY

A. Rules of Professional Conduct: In making its determination, the trial court referred to Rule 1.5 of the Rules of Professional Conduct.

B. Utah Case Law: In making its determination, the trial court referred to the Utah Supreme Court decision in Phillips v. Smith, 768 P.2d 449, 451 (Utah 1989). That case held that, for a statutory attorney's lien to arise between the parties, the contingent fee agreement must be in writing; and that, if the terms of the agreement do not reflect, in writing, what effect a termination of the agreement would have on the fees of the attorney, then there does not exist a statutory lien. Archuleta v. Hughes, 969 P.2d 409 (Utah 1998) held that Rule 1.5 of the Rules of Professional Responsibility does not provide a basis for civil liability against attorneys.

Bullock v. State Department of Transportation, 966 P.2d 1215 (Utah App. 1998), Westinghouse Credit Corp. v. Hyrdoswift Corp., 528 P.2d 156 (Utah 1974), and Lowe v. April Industries, Inc., 531 P.2d 1297 (Utah 1974) are cases which hold that a party may, by its actions, ratify a contract.

C. Statutes: The primary statutory provision governing attorney's fee liens is U.C.A. §78-51-41 (1953), as amended. The primary statutory provision governing the award of interest in legal claims is U.C.A §15-1-1 (1953), as amended.

STATEMENT OF THE CASE

1. Nature of the Case

This appeal is from a final order of the First Judicial District Court, Hon. Thomas L. Willmore, which partially granted Plaintiff's Motion for Summary Judgment and partially granted Defendants Motion for Summary Judgment.

2. Course of Proceedings

Plaintiff/Appellee Westenskow filed a Complaint against Defendant/Appellant, claiming that Appellee Westenskow did not have a written contingent fee agreement with Defendant/Appellant and, therefore, did not owe Appellant an attorney's fee upon settlement of a wrongful death claim. Plaintiff/Appellee Loffredo filed a complaint against the Defendant/Appellant in which she claimed that Defendant knowingly misrepresented the terms of the written contingent fee agreement that she had entered into with the Defendant and that Defendant should receive a contingent fee of only 25% instead of the 33% Defendant claimed. Both Plaintiffs sought a return from Defendant of a total of $45,000.00 which Defendant had retained from the settlement of Plaintiff's claims as attorney's fees. The Defendant /Appellant filed a Motion for Summary Judgment, asking the court to rule that Loffredo owed him an attorney's fee

arising for the settlement of the wrongful death action and attorney's fees and costs arising out of his action to enforce the contingent fee agreement and defending against Loffredo's claim against Defendant.

3. Disposition in Lower Court

The trial court granted Plaintiff/Appellee Westenskow's Motion for Summary Judgment, but denied Plaintiff/Appellee Loffredo's Motion for Summary Judgment. The trial court granted Defendant's Motion for Summary Judgment, but did not rule whether or not Loffredo owed Defendant/Appellant attorney's fees as set forth in the contingent fee agreement.

STATEMENT OF FACTS

1. Heidi Westenskow was killed in an automobile accident on May 27, 1994. Heidi was the daughter of both Plaintiffs in this action.
2. Plaintiff Loffredo retained Defendant to represent her interests in a wrongful death action arising from an automobile accident involving Heidi, and signed a contingent fee agreement with Defendant. (Attached as Exhibit "A", hereto). (Record on Appeal, hereinafter "R". 301-304)
3. In that contingent fee agreement, both Plaintiff Loffredo and Defendant agreed that "In the event

legal proceedings are necessary to enforce the terms of this agreement, the defaulting party agrees to pay a reasonable attorney fee plus costs of court."

4. Plaintiff Westenskow retained another attorney, Robert L. Neeley, to represent his interests arising from that same automobile accident. (R. 301-304)
5. During a meeting in November, 1994 at Neeley's office, it was agreed that Westenskow and Loffredo would split any recovery, after costs and attorney's fees, with Loffredo receiving 70% and Westenskow receiving 30%. (R. 301-304)
6. It was also agreed during that meeting that Defendant would represent Westenskow and that Westenskow would pay Defendant a contingent fee on the same terms as the written fee agreement that Defendant had with Loffredo. (R. 301-304)
7. Any and all potential conflicts between Defendant and Plaintiffs as a result of Defendant's representation of both Plaintiffs were openly discussed and resolved, with the Plaintiffs agreeing to have Defendant represent them both.
8. Defendant sent a letter to Neeley confirming the oral agreement reached in Neeley's office and sent a

written fee agreement to Neeley for Westenskow's signature.

9. Westenskow did receive the written contingent fee agreement. (R. 301-304)

10. Defendant did not receive the signed fee agreement back from Neeley, but assumed that Westenskow had signed the agreement.

11. On January 27, 1995, Farmer's Insurance Exchange filed a complaint on its own behalf, naming Loffredo and Westenskow as defendants.

12. The claims brought in the Farmer's Insurance Exchange action were successfully settled in favor of the Plaintiffs through the efforts of Defendant on April 28, 1995.

13. On three separate occasions after the settlement of the claim Westenskow signed a Settlement Statement in which he acknowledged that he was paying a one-third contingent fee to Defendant and in which he acknowledged and ratified his retainer agreement with Defendant. (Exhibits "B", "C" and "D", attached hereto). (R. 301-304)

14. Both Plaintiffs filed an action against Defendant, claiming that they did not owe a fee to Defendant

and seeking return of the fees held by Defendant. (R. 001-008)

15. The trial court ruled that the written fee agreement that Defendant had with Loffredo was valid but that, because Defendant did not have a written fee agreement with Westenskow, Westenskow did not owe Defendant a fee. (R. 301-304)

16. The trial court held, however, that Westenskow owed Defendant a reasonable attorney's fee, apparently on a quantum meruit theory, and ordered Defendant to file an accounting of time and costs within twenty (20) days of the entry of the Memorandum Decision on June 29, 1999. (R. 301-304)

17. The Plaintiffs filed a proposed Order and Judgment on August 19, 1999.

18. The trial court signed the Order and Judgment on September 1, 1999 (R. 309-311).

19. That Order and Judgment was objected to by Defendant on September 2, 1999. (R. 312-313)

20. On October 18, 1999 Defendant filed his accounting of time and costs with the court.

21. There was a hearing on Defendant's Objections on October 26, 1999. (R. 344)

22. Plaintiff Westenskow objected to Defendant's accounting of time and costs as not having been timely filed with the trial court.

23. The trial court held that, because the Defendant's accounting of time and costs was not timely filed under the trial court's Memorandum Decision of June 29, 1999, Westenskow owed nothing to Defendant for any time expended on behalf of Westenskow. (R. 354-357)

24. The trial court also did not award attorney's fees or costs against Loffredo in favor of Defendant, even though the written fee agreement between Loffredo and Defendant provided for attorney's fees and costs to the prevailing party in event of a dispute.

SUMMARY OF ARGUMENT

Summary judgment should be granted only when the evidence, considered in the light most favorable to the non-moving party, demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.

The grounds considered by the court in granting the Plaintiffs/Appellees' Motion for Summary Judgment in this case are that 1) Rule 1.5 of the Rules of Professional

Conduct require that a contingent fee agreement be in writing, which agreement was not reduced in writing as it applied to Plaintiff Westenskow; and, 2) the Defendant/Appellant's accounting of fees and costs was not timely filed by the Defendant/Appellant and that he should not be awarded any fees as against Westenskow.

Rule 1.5 of the Rules of Professional Conduct does not set forth a standard for civil liability, as the trial court attempts to do. Additionally, the contingent fee agreement was in writing (although not signed by Westenskow), which is all that is required by Rule 1.5.

Further, the ratification by the Plaintiffs of the oral agreement between the parties (by their signatures on the Closing Settlement Statements) was enough to justify paying a contingent fee to Defendant.

Defendant did not file his affidavit of attorney's fees because he was relying upon the fact that he believed that he was in settlement negotiations with the attorney for the Plaintiffs, which would preclude the necessity of the filing of the affidavit.

Finally, the trial court failed to order any attorney's fees or costs in favor of the Defendant, although such fees and costs are allowed in the written,

signed fee agreement between Loffredo and Defendant and Defendant prevailed in the action against Loffredo.

ARGUMENT

I

THE ORAL AGREEMENT BETWEEN WESTENSKOW AND DEFENDANT WAS ENFORCEABLE AND DEFENDANT WAS ENTITLED TO A CONTINGENT FEE EVEN ABSENT A WRITTEN AGREEMENT

A) The Rules of Professional Responsibility are not a basis for civil liability of an attorney.

The Plaintiffs met with their respective attorneys in November, 1994 in an attempt to resolve the question of which party would get what amount from any settlement of their wrongful death action which arose from the death of their daughter. An agreement between the parties was reached (Loffredo agreeing to receive a 70% share and Westenskow a 30% share, and with Defendant representing both Plaintiffs thereafter). The agreement between the Plaintiffs and their agreement to have Defendant represent them was memorialized in a letter written by Defendant and sent to Robert Neeley, Westenskow's attorney. In that letter was enclosed a contingent fee retainer agreement for Westenskow to execute. That contingent fee retainer agreement also included provisions whereby Westenskow would agree to pay a contingent fee to Plaintiff.

Several months later, on April 25, 1995, the court case between the Plaintiffs and Farmer's Insurance Exchange was settled favorably for Plaintiffs. On October 9 and again on October 25, 1995, Plaintiffs each signed a "Closing Settlement Statement". Each statement settled their claims against the insurance companies involved in this matter, acknowledged their fee agreement with Defendant and agreed with the Defendant's accounting of funds from the settlement, including the payment of Defendant's attorney's fees and costs. A third Closing Settlement Statement was signed by the Plaintiffs, but is not dated.

In their Memorandum in Support of their Motion for Summary Judgment the Plaintiffs relied chiefly upon the language of Rule 1.5(c) of the Rules of Professional Responsibility as their basis for the claim that Defendant was not entitled to a contingent fee from Westenskow.

Rules 1.5(c) of the Rules of Professional Responsibility states:

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited
> by paragraph (d) or other law. A contingent fee shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to

> the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

The trial court, in its Memorandum Decision dated June 29, 1999, relied solely upon the language of Rule 1.5(c) of the Rules of Professional Responsibility in holding that the Defendant was not entitled to a contingent fee from Westenskow.

In the case of Archuleta v. Hughes, 969 P.2d 409 (Utah 1998), a legal malpractice case, the Supreme Court stated that:

> We agree with the court of appeals, and conclude that the Utah Rules of Professional Conduct are not designed to create a basis for civil liability.

The Rules of Professional Responsibility themselves agree with the conclusion of the Utah Supreme Court.

The Rules of Professional Responsibility, under the section entitled "Scope", state:

> Violation of a Rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are

> not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment or for sanctioning a lawyer under the administration of a disciplinary authority does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rule should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. (Emphasis added)

Other jurisdictions have followed the admonition of the Rules and have refused to allow the Rules to be a basis for civil liability against an attorney.

> The Rules are not designed for a basis for civil liability, but are to provide guidance to lawyers and to provide a structure for regulatory conduct through disciplinary agencies. No cause of action should arise from a violation, nor should it create any presumption that a legal duty has been breached.

Orsini v. Larry Moyer Trucking, Inc., 833 S.W. 2d 366 (Ark. 1992). The Washington Court of Appeals in Harrington v. Pailthorp, 841 P.2d 1258 (Wash.App.Div.1 1992) held that:

> [A]n attorney's violation of RPC provisions does not give rise to an independent cause of action against an attorney. . . Even if Harrington could show Pailthorp violated any RPC's, he would have no claim against her solely on that basis. (Emphasis added)

B) Rule 1.5 of the Rules of Professional Conduct does not require that the written contingent fee agreement be signed by the parties.

Rule 1.5 of the Rules of Professional Conduct states only that:

> A contingent fee shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement . . .

There is no requirement under Rule 1.5 that the contingent fee agreement be signed by any of the parties. The Memorandum Decision entered by the trial court in this case states:

> Westenskow entered the matter at a later date and did not sign such an agreement, though it appears he received a copy of the agreement which he was supposed to sign. (R. 301-304)

In this case, the contingent fee agreement <u>was</u> in writing and was supplied to Westenskow, although not signed by the parties, and was ratified by Westenskow.

C) An oral contract can be ratified by the actions or statements of a party and can be enforceable.

In this case, the parties agreed during a meeting between them and their respective counsel that:

1) Defendant would represent both Plaintiffs;
2) That the Plaintiffs would split any settlement between them on the basis of 70% for Loffredo and 30% for Westenskow; and

3) That Defendant would be entitled to a contingent fee from Westenskow on the same basis as that contained in his written contingent fee agreement with Loffredo. That is, a contingent fee of 25% prior to filing of suit and 33.33% thereafter.

4) That Defendant would send a written contingent fee agreement to Westenskow's then attorney and that Westenskow would execute that agreement. (R. 301-304)

Defendant sent a written contingent fee agreement to Westenskow, but Westenskow never signed the fee agreement. (R. 301-304) However, on three separate occasions, Westenskow did sign a document entitled "Closing Settlement Statement", wherein it was disclosed to him that his claim had settled for a certain amount, that certain expenses were being paid out of that settlement and that a contingent fee was being paid to Defendant. (R. 301-304 and Exhibits "B" through "D", attached hereto).

Those "Closing Settlement Statements" also contained the following paragraph, over the signatures of both Loffredo and Westenskow:

> COMES NOW the undersigned who hereby acknowledge that they have reviewed the Closing Settlement Statement and find that it is in accordance with the

terms and conditions of the retainer agreement with their Attorney, Scott W. Holt. They further acknowledge they authorized said attorney to accept said sums as settlement in full for their wrongful death claim re: Heidi Westenskow and acknowledge receipt of a check for the full amount due each client. (Emphasis added)

In the case of Bullock v. State Department of Transportation, 966 P.2d 1215 (Utah App. 1998), the Utah Court of Appeals held that:

> Any conduct which indicates assent . . . which is justifiable only if there is ratification is sufficient [to ratify a contract]. Even silence with full knowledge of the facts may manifest affirmance and thus operate as a ratification . . . (Emphasis added) Id. at 1219.

In the case of Westinghouse Credit Corp. v. Hyrdoswift Corp., 528 P.2d 156 (Utah 1974), the Utah Supreme Court held that:

> There is also a well recognized rule that a corporation may not represent to another party that it has executed a valid contract, induce the other to perform, accept the benefits, and then when it suits its interest, renege and escape the burdens of the contract. By so engaging in the business and enjoying its advantages the corporation is deemed to ratify the contract, wherefore, it cannot then repudiate and avoid its obligations. (Emphasis added) Id. at 157

Although obviously not corporations, the general rule set forth above applies equally to private individuals such as the Plaintiffs in this case. While a written contract between Westenskow and Defendant was never executed, an

oral agreement was certainly entered into between them. (R. 301-304)

Finally, the Utah Supreme Court has held that "Implied [ratification may arise] under circumstances of acquiescence or where a duty to disaffirm is not promptly exercise." Lowe v. April Industries, Inc., 531 P.2d 1297 (Utah 1974). In this case, the Plaintiffs orally agreed to have Defendant jointly represent them in their wrongful death claim; then, upon settlement of the claim, and in writing, agreed with the settlement and the disbursement of the monies from the settlement, including Defendant's contingent fee; and then, without making complaint, cashed their checks from the Defendant. It wasn't until some three months after they signed the "Closing Settlement Agreement" that some "buyer's remorse" occurred and they wanted to abrogate the agreement with Defendant.

Westenskow ratified the oral contingent fee agreement that he had with the Defendant and he should be held to that agreement.

II

DID THE DEFENDANT FAIL TO TIMELY FILE AN AFFIDAVIT OF ATTORNEY'S FEES WHICH WOULD PRECLUDE HIM FROM AN AWARD OF FEES?

On June 30, 1999, the trial court issued a Memorandum Decision (R. 301-304) in which it ruled partly in favor of

Plaintiffs and partly in favor of Defendant. In that Memorandum Decision, the trial court ordered the Defendant to file an affidavit of attorney's fees and costs within twenty (20) days of the date that the decision was issued. It wasn't until August 19, 1999 that the attorney for Plaintiffs got around to filing an Order and Judgment based on the Memorandum Decision of the trial court. Defendant filed an Objection to the Order and Judgment filed by Plaintiffs on September 2, 1999.

During the period of time from June 30, 1999 until the Defendant filed his Affidavit of Fees and Costs on October 18, 1999, Plaintiff's attorney and Defendant were in settlement negotiations, attempting to resolve this matter. Settlement negotiations continued until Defendant left for a trip out of the country on August 3, 1999. On August 19, 1999, while Defendant was out of the country (and Plaintiff's counsel was aware of Defendant's absence), the Order and Judgment was filed.

Defendant assumed that during such negotiations he would not be required to file his affidavit of fees and costs, which would only serve to further inflate those fees. Defendant believed that he could rely on statements by Plaintiff's counsel that he was going to talk with his clients and get back to Defendant and that a filing of

Defendant's Affidavit of Fees and Costs would not be required until the settlement negotiations broke down.

III

UNDER THE WRITTEN FEE AGREEMENT WITH LOFFREDO, THE DEFENDANT IS ENTITLED TO ATTORNEY'S FEES AND COSTS UPON PREVAILING ON LOFFREDO'S CLAIMS AGAINST DEFENDANT

In the written fee agreement between Loffredo and Defendant, the parties agree that:

> In the event legal proceedings are necessary to enforce the terms of this agreement, the defaulting party agrees to pay a reasonable attorney fee plus costs of court.

Loffredo brought suit against Defendant, claiming that she did not owe him an attorney's fee under the contingent fee agreement. The trial court held against Loffredo and held that she did, under the terms of the written contingent fee agreement, owe Defendant an attorney's fee.

Clearly, Defendant prevailed on that issue. Under the express written terms of the fee agreement, he is entitled to attorney's fees and costs against Loffredo. "If provided for by contract, attorney fees are awarded in accordance with the terms of that contract." Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah.Ct.App.1993). Where a contract provides the "right to attorney fees, Utah courts have allowed the party who successfully prosecuted or defended against a claim to recover the fees attributable to

those claims on which the party was successful." Occidental/Nebraska Federal Savings v. Mehr, 791 P.2d 217, 221 (Utah Ct.App.1990). The trial court erred in failing to award Defendant attorney's fees and costs against Loffredo.

IV

PRE-JUDGMENT INTEREST SHOULD NOT HAVE BEEN AWARDED IN FAVOR OF PLAINTIFF WESTENSKOW

The trial court held that pre-judgment interest should be awarded to the Plaintiff on the amounts of the contingent fee that Defendant owes Westenskow. The trial court relied on the cases of Fitzgerald v. Crutchfield, 744 P.2d 301, 304 (Utah App. 1987) and Lignell v. Berg, 593 P.2d 800, 801 (Utah 1979). However, those cases both dealt with claims based on contracts.

In this case, the trial court found that there was not a written fee agreement between Westenskow and Defendant. Absent such a "contract", pre-judgment interest is not appropriate. U.C.A. §15-1-1 (1953), as amended, provides for pre-judgment interest only in cases where the interest is provided for in the contract. There are no other statutory provisions which support the trial court's conclusion that an award of pre-judgment interest was appropriate in this case.

CONCLUSION

The trial court found that there was an agreement between Westenskow and Defendant, but that the contingent fee agreement between them was not in writing. Using Rule 1.5 of the Rules of Professional Conduct as its basis, the trial court found that Westenskow did not owe a contingent fee to Defendant. The trial court erred in that conclusion because 1) the trial court should not have relied solely on Rule 1.5 of the Rules of Professional Conduct; 2) there was a written contingent fee agreement between Westenskow and Defendant, albeit not signed; and 3) there was an oral agreement allowing for a contingent fee between Westenskow and Defendant, which Westenskow ratified three times in writing.

The trial court erred in denying Defendant's Affidavit of Attorney's Fees. The Defendant was in negotiations with the Plaintiffs regarding this matter and believed, rightly, that an affidavit was not necessary at that time. In any event, the trial court erred in denying completely any attorney's fees for Defendant based solely on his inadvertent failure to file an attorney's fee affidavit within a time limit set by the court.

Finally, the trial court erred in failing to award attorney's fees in favor of the Defendant against Plaintiff Loffredo when Defendant prevailed in the action brought by

Loffredo. The written, signed contingent fee agreement between Loffredo and Defendant clearly provided that the prevailing party would be awarded attorney's fees and costs. The trial court should have awarded those fees and costs against Loffredo.

DATED this 10th day of August, 2000.

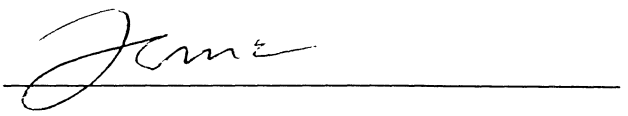
NEIL B. CRIST & ASSOCIATES
Attorneys for Defendant/Appellant

By: _____
LEONARD E. McGEE

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLANT was sent, via First Class U.S. Mail, postage pre-paid, to the following counsel of record, this 10th day of August, 2000:

Scott Waterfall
HELGESEN, WATERFALL & JONES
Attorneys for the Plaintiffs/Appellees
4605 Harrison Blvd., Third Floor
Ogden, Utah 84403



ADDENDUM

EXHIBIT A	Retainer Agreement
EXHIBIT B	Closing Settlement Statement (First)
EXHIBIT C	Closing Settlement Statement (Second)
EXHIBIT D	Closing Settlement Statement (Third)
EXHIBIT E	Memorandum Decision (June 29, 1999) Order and Judgment (January 26, 2000) Memorandum Decision (December 15, 1999)
EXHIBIT F	Utah Code Annotated § 78-51-41 Rule of Professional Conduct 1.5

RETAINER AGREEMENT

This Agreement made this 31st day of May, 1994, by and between Bonnie Lofthouse who resides at _____, hereinafter referred to as CLIENT and SCOTT W. HOLT, hereinafter referred to as ATTORNEY.

Client retains Attorney in the following matter(s): claim re: death of daughter Heidi age 16 on or about 5/27/94 in Ogden, Utah

and empowers him to do all things and to effect a compromise in said matter, or to institute such legal action as may be advisable in his judgment and agrees to pay for his services:

a. 33 percent of the amount recovered ~~with or~~ without suit.† In the event of appeal, an additional agreement for services shall be made by the parties.

b. ~~The sum of~~ N/A $_____ forthwith and the balance of $_____ payable as follows: _____

c. ~~On~~ N/A the basis of time expended by Attorney at the rate of $_____ per hour.

Costs and necessary disbursements are to be advanced by client, prior to hearing, or trial.

Client agrees to make no settlement with the opposing party except in the presence of the Attorney; any settlement so obtained shall be subject to the terms of this agreement.

Client agrees that he will not substitute Attorneys without the consent of the Attorney; substitutions in violation hereof shall entitled the Attorney to full fee set forth above.

It is agreed that Attorney has made no representations regarding the successful termination of the cause of action.

In the event legal proceedings are necessary to enforce the terms of this agreement the defaulting party agrees to pay a reasonable attorney fee plus costs of Court.

ACCEPTED:

Bonnie Lofthouse
CLIENT

S W Holt
ATTORNEY

_____
CLIENT

† If suit is filed then contingent fee is to be one-third (1/3) of amount recovered

USAA Underinsured coverage settlement	S	35,000.00
Less Attorney's fees as per Retainer Agreement @ 1/3		11,666.67
Subtotal:	S	23,333.33
Less Costs and Expenses in arrears		-0-
NET SETTLEMENT TO BONNIE LOFFREDO	S	16,333.33
NET SETTLEMENT TO DONALD WESTENSKOW	S	7,000.00
BALANCE REMAINING:	S	-0-

ACKNOWLEDGMENT

COMES NOW the undersigned who hereby acknowledge that they have reviewed the Closing Settlement Statement and find that it is in accordance with the terms and conditions of the retainer agreement with their Attorney, Scott W. Holt. They further acknowledge they authorized said attorney to accept said sums as settlement in full for their wrongful death claim re: Heidi Westenskow and acknowledge receipt of a check for the full amount due each client.

DATED this 9th day of ~~September~~ October 1995.

BONNIE LOFFREDO

DONALD WESTENSKOW

EXHIBIT B

Less Attorney's fees as per Retainer Agreement @ 1/3		16,666.67
Subtotal:	$	33,333.33
Less Costs incurred:		
Certification fee of Judgment		15.00
Remaining Balance:	$	33,318.33
NET SETTLEMENT TO BONNIE LOFFREDO	$	23,322.83
NET SETTLEMENT TO DONALD WESTENSKOW	$	9,995.50
BALANCE REMAINING:	$	-0-

ACKNOWLEDGMENT

COMES NOW the undersigned who hereby acknowledge that they have reviewed the Closing Settlement Statement and find that it is in accordance with the terms and conditions of the retainer agreement with their Attorney, Scott W. Holt. They further acknowledge they authorized said attorney to accept said sums as settlement in full for their wrongful death claim re: Heidi Westenskow and acknowledge receipt of a check for the full amount due each client.

DATED this 25 day of October, 1995.

BONNIE LOFFREDO

DONALD WESTENSKOW

EXHIBIT C

POLICY LIMITS FROM STATE FARM:	$	50,000.00
Less Attorney's fees as per Retainer Agreement @ 1/3		16,666.67
Subtotal:	$	33,333.34
Less Funeral Expenses (Previously paid directly to Chapel of Flowers):	$	3,000.00
Subtotal:	$	30,333.34
Reimbursement to Bonnie Loffredo for out of pocket and non-reimbursed expenses re: Heidi		- 3,354.10
Total Net Settlement:	$	26,979.24
To Bonnie Loffredo	$	18,885.46
(Plus reimbursement)		3,354.10
Total:	$	22,239.56
To Donald Westenskow	$	8,993.77

ACKNOWLEDGMENT

COMES NOW the undersigned and acknowledge that they have reviewed the closing statement and find that it is in accordance with the terms of the retainer agreement. That they further acknowledge they authorized SCOTT W. HOLT to disburse the proceeds pursuant to the Closing Statement. Further, that they acknowledge receipt of a check for the full amount due each client. They also understands that if there are any additional medical expenses which have not been paid to date that any said amounts would be paid from the net proceeds and they would be responsible to pay them.

BONNIE LOFFREDO

DONALD WESTENSKOW

EXHIBIT D

FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY
STATE OF UTAH

BONNIE LOFFREDO and DONALD A. WESTENSKOW, Plaintiff, vs. SCOTT W. HOLT Defendant.	]]]]]]]]]	MEMORANDUM DECISION Case No. 980100068 Judge Thomas L. Willmore

THIS MATTER comes before the Court on Plaintiffs' and Defendant's separate motions for summary judgment. Plaintiffs and Defendant each filed in response to said motions and on May 25, 1999, the court heard oral argument. Having considered the matter, the Court now issues this Memorandum Decision.

On May 31, 1994, Bonnie Loffredo (Loffredo) executed a contingent fee agreement securing Defendant's services in a wrongful death action which arose when her daughter was killed in an automobile accident. The agreement provided that Defendant would receive 25% of any recovery or 33 1/3% "if suit is filed."

On November 8, 1994, Defendant and Loffredo attended a meeting in attorney Robert Neeley's office to discuss an apportionment of recovery with the decedent's father, Donald A. Westenskow (Westenskow). At the time, Robert Neeley represented Westenskow and Defendant represented Loffredo.

During the meeting, it was agreed that Westenskow would receive 30% of any recovery and Defendant would receive 70%. It was also agreed that Defendant would represent both

6-30-99

parties and that Westenskow would sign a contingent fee retainer agreement with Defendant identical to the Loffredo agreement. In the end, Westenskow failed to sign the agreement.

In January of 1995, Farmers Insurance Exchange filed a declaratory action naming Loffredo and Westenskow as defendants. Farmers Insurance Exchange was one of three insurance companies potentially providing coverage for the accident at issue. Eventually, the three insurance companies settled with Plaintiffs and tendered payment via three separate checks totaling $135,000. As each check was received, Defendant withdrew 33 1/3% and apportioned the remaining sum 70/30 as per the parties agreement. Loffredo and Westenskow signed three separate settlement statements over the course of several weeks that noted Defendant's withholding of 33 1/3% as fees.

Plaintiffs' complaint alleges Defendant wrongfully withheld fees from the settlement in that he was not entitled to 33 1/3% of the recovery.

Rule 1.5(c) of the Rules of Professional Conduct requires contingent fee agreements to be written. Loffredo signed the agreement provided by Defendant prior to the representation. Westenskow entered the matter at a later date and did not sign such an agreement, though it appears he received a copy of the agreement which he was supposed to sign.

The Court has considered the filings, affidavits, and arguments set forth by the parties, and finds that no issues of disputed material fact exist and judgment may issue as a matter of law.

The Court finds that plaintiff Bonnie Loffredo is bound by the contingent fee agreement. Farmers insurance Exchange filed suit and Defendant represented Plaintiffs in that matter. Therefore, Defendant is entitled to 33 1/3% of the recovery from Bonnie Loffredo, sums already retained by Defendant.

Plaintiff Westenskow, however, did not sign the contingent fee agreement. The Court finds that since Westenskow did not sign the contingent fee agreement, he is not subject to its terms. Phillips v. Smith, 768 P.2d 449, 451 (Utah 1989). Nevertheless, Defendant provided

services on behalf of Westenskow, from which Westenskow benefitted. Plaintiff Westenskow will be liable to Defendant for a reasonable fee for services rendered. Therefore, the Court orders defendant to submit an accounting of time and costs expected on behalf of Westenskow within 20 days from the date of this Memorandum Decision. If Westenskow objects to any portion of Defendant's accounting then Westenskow must file his objections with the Court within 14 days from receipt of Defendant's accounting. The Court will review any objections by Westenskow.

For the foregoing reasons, Plaintiffs' and Defendant's motions for summary judgment are denied in part and granted in part as provided herein.

This Memorandum Decision issues this 29 day of June, 1999.

Thomas L. Willmore

Thomas Willmore
District Judge

STATE OF UTAH
1st DISTRICT COURT
CACHE COUNTY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980100068 by the method and on the date specified.

METHOD	NAME
Mail	Scott W. Holt 44 North Main Street Layton UT 84041
Mail	R Scott Waterfall 4605 South Harrison Blvd. Suite 300 Ogden UT 84403

Dated this 30 of June, 1999.

L. Clark
Deputy Court Clerk

R. SCOTT WATERFALL #3680
CATHERINE F. LABATTE #6763
HELGESEN, WATERFALL & JONES
Attorneys for Petitioners
4605 Harrison Boulevard, Third Floor
Ogden, Utah 84403
Telephone (801) 479-4777
Facsimile (801) 479-4804

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

BONNIE LOFFREDO and DONALD A. WESTENSKOW, Plaintiffs, v. SCOTT W. HOLT, Defendant.	} } } } } } } } }	ORDER AND JUDGMENT Civil No. 980100068CN Judge Thomas L. Willmore

THIS MATTER came before the Court on Plaintiffs' and Defendant's separate motions for summary judgment. Plaintiffs and Defendant each filed responses to said motions and on May 25, 1999 the Court heard oral argument. Plaintiffs were present and represented by counsel, R. Scott Waterfall. Defendant was present, acting *pro se*. The Court entered its Memorandum Decision on June 29, 1999.

On August 17, 1999, Plaintiffs submitted an Order and Judgement based on this Memorandum Decision to which Defendant objected.

A further hearing on this matter and Defendant's Objection to Order was held came before the Court on October 20, 1999. The Court heard oral argument from Plaintiffs' counsel

R. Scott Waterfall, and Defendant Scott W. Holt, acting *pro se*. The court entered its Memorandum Decision on December 15, 1999. Based upon its June 29, 1999 and December 15, 1999, Memorandum Decisions the Court makes and enters the following Order and Judgment:

1. Plaintiff Bonnie Loffredo entered a written contingent attorney fee agreement with Defendant Holt and is bound by its terms. Farmers Insurance Exchange filed suit and Defendant represented Plaintiff Loffredo in that matter concerning the wrongful death of Plaintiff's daughter, Heidi Westenskow. Therefore, Plaintiff Loffredo's claim for return a portion of the attorneys fees is denied.

2. Plaintiff Donald A. Westenskow did not sign a contingent attorney fee agreement with Defendant. Therefore, Defendant Holt is not entitled to a contingent attorneys fee. Defendant was ordered to submit to the Court a claim for reasonable attorney fees for services rendered no later than twenty (20) days from the Memorandum Decision dated June 29, 1999 (July19, 1999).

3. Defendant Holt failed to submit his time accounting in a timely manner and the Court will not allow Defendant's late filing. Further, Defendant Holt did not keep accurate time records. Therefore, Defendant is not entitled to attorney fees incurred on behalf of Plaintiff Westenskow.

4. Defendant Scott W. Holt is ordered to pay plaintiff Donald A. Westenskow and Judgment is entered in favor of Donald A. Westenskow against defendant, Scott W. Holt, as follows:

Return of withheld funds		$13,500.00	(1/3 x $40,500.00 (30% x $135,000))
Accrued pre-judgment interest for 10/1/95 to 12/31/99		5,737.50	(10% per annum per UCA§15-1-1)
Costs:			
Court filing	$120.00		
Service of process	12.00		
Deposition of Scott Holt	135.00		
		267.00	
JUDGMENT AMOUNT		$19,504.50	

5. Prejudgment interest shall continue for January 1, 2000 through the date of entry of Judgment at $3.70 per day.

6. The judgment shall be augmented by costs of collection including reasonable attorney fees, costs and post judgment interest.

DATED this 26 day of January, 2000.

By the Court:

STATE OF UTAH FIRST DISTRICT COURT BRIGHAM CITY

Thomas L. Willmore

THOMAS L. WILLMORE
District Court Judge

Certificate of Mailing

I hereby certify that I delivered a true and correct copy of the forgoing Order via facsimile (801) 546-1420 and U.S. Mail to Scott W. Holt, 44 North Main, Layton, Utah 84041, on this 5th day of January, 2000.

Paralegal

Pursuant to Rule 4-504(2), Utah Rules if Judicial Administration, the original Order and Judgment will be submitted to the Court after five (5) days if no objection is filed.

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF BOX ELDER

BONNIE LOFFREDO and DONALD WESTENSKOW, **Plaintiffs,** **vs.** **SCOTT W. HOLT,** **Defendant.**	**HON. THOMAS L. WILLMORE** **MEMORANDUM DECISION** **Case No. 980100068 CN**

This matter is before the Court on plaintiffs' proposed Order and Judgment and defendant's Objection to Judgment and Order. Oral argument was presented to the Court on October 20, 1999. Having heard the argument of the parties and reviewing written memoranda filed by the parties, the Court now issues this Memorandum Decision. The pertinent facts concerning the proposed Order and Judgment and Objection thereto are as follows:

1. On June 29, 1999, the Court issued a Memorandum Decision granting in part and denying in part plaintiffs' and defendant's Motions for Summary Judgment. Specifically, the Court ruled that Westenskow did not sign a contingent fee agreement and was not subject to its terms. It was ordered that Westenskow would be liable to defendant for reasonable fees for services rendered on his behalf and the remainder would be returned by defendant to Westenskow.
2. The Court ordered defendant to submit an accounting of time and costs expended on behalf of Westenskow within twenty days from the date of the Memorandum Decision.
3. On August 19, 1999, plaintiffs filed an Order and Judgment with the Court.
4. On September 2, 1999, defendant filed an Objection to Judgment and Order.
5. Defendant did not file an accounting until October 18, 1999.

The first issue before the Court is whether defendant should be allowed to claim attorney's fees when he failed to comply with the Court's Order and submit an accounting within twenty days of the Court's Memorandum Decision. The Memorandum Decision was issued on June 29, 1999. The Memorandum Decision clearly informs the defendant to submit an accounting of time expended on behalf of Westenskow within twenty days of the date of the Memorandum Decision. Therefore,

Defendant did not file anything with the Court until September 2, 1999, when he filed an Objection to the Judgment and Order. No accounting of defendant's time expended on behalf of Westenskow was filed with the Objection on September 2nd. It was not until October 18, 1999 that defendant filed an Affidavit of time incurred. Therefore, it was not until approximately three months after its due date did defendant file an accounting with the Court.

At the oral argument on October 20, 1999, the defendant argued that he and plaintiffs' counsel had been in negotiations concerning settlement of the judgment amount and that defendant had made an offer to plaintiffs to settle the case. Defendant submits that he did not file an accounting because it was his understanding that negotiations were ongoing.

Defendant's argument is unsupported by the facts. There is a letter dated July 13, 1999 from plaintiffs' counsel to defendant indicating that defendant's offer would be reviewed with his clients, but there is nothing in the letter stating that an Order and Judgment would not be submitted to the Court pending the negotiations. Defendant did not send a confirming letter to plaintiffs' counsel about waiting to submit the Order while settlement negotiations continued. Neither did defendant file a simple request with the Court for more time to submit an accounting. The continued failure of defendant to follow-up with simple details is the very reason this case is again before the Court.

An examination of defendant's Affidavit of accounting clearly shows that it is "estimated time." Also, plaintiffs' counsel has pointed the Court to defendant's answers to interrogatories numbers 6 and 8, dated February 26, 1998 which were signed by the defendant and indicates that no time records have been kept in the case. In order for defendant to be reimbursed for his time, he must submit to the Court an accurate and reliable accounting of time incurred on behalf of defendant Westenskow. The Court finds that defendant has failed to do so.

Therefore, defendant has failed to comply with the Court's Order in the Memorandum Decision issued June 29, 1999. Defendant did not file an accounting with the Court until approximately three months after its due date. Since defendant's accounting is not timely filed, the Court will not allow it and defendant will not receive any credit for alleged hours

The next issue before the Court is whether any specific findings of fact or conclusions of law were required to be submitted in the Order and Judgment. In a letter to the Court dated October 29, 1999, the defendant submits that specific findings of fact are not required in a Summary Judgment. Rule 52 (a) of the Utah Rules of Civil Procedure provides that the trial Court need not enter findings of fact and conclusions of law in rulings on Motions.

The final issue raised by defendant is whether statutory pre-judgment interest of 10 % is applicable to plaintiffs' Judgment against defendant. Defendant submits that plaintiffs' right to pre-judgment interest pursuant to UCA § 15-1-1 is applicable only to contracts. In the Court's June29, 1999 Memorandum Decision, it ruled that defendant's attorney's fees were not proper pursuant to an unsigned contingent fee agreement and that defendant should return the attorney's fees to Westenskow subject to defendant's reasonable time worked on behalf of Westenskow. In other words, defendant owed a sum certain from the date of settlement to Westenskow. The law is clear that Westenskow is entitled to pre-judgment interest on this overdue debt from the date it should have been paid until entry of Judgment. Fitzgerald v. Critchfield, 744 P. 2d 301, 304 (Utah App. 1987) The issue of pre-judgment interest "is injected by law into every action for the payment of past due money." Lignell v. Berg, 593 P. 2d 800, 801 (Utah 1979). Therefore, Westenskow is entitled to pre-judgment interest from the date of the personal injury settlement to the date of Judgment.

Plaintiffs' counsel is directed to prepare an Order in conformance with this Memorandum Decision.

DATED this 15 day of December, 1999.

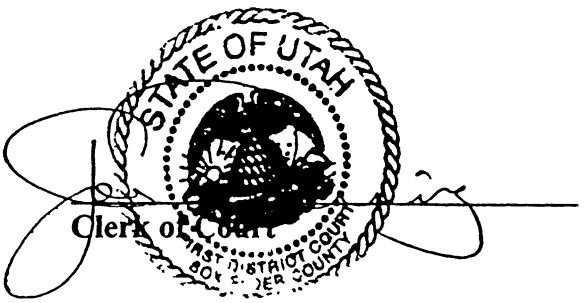
Thomas L. Willmore
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of December, 1999, I mailed a true and correct copy of the foregoing Memorandum Decision, in the case of *Loffredo/Westenskow vs. Holt, case number 980100068* as follows:

R. Scott Waterfall
Catherine F. Labatte
Attorneys At Law
4605 Harrison Boulevard, 3rd Floor
Ogden, Utah 84403-7000

Scott W. Holt
44 North Main
Layton, Utah 84041



Clerk of Court

Utah Code § 78-51-41

UTAH CODE, 1953
WEST'S UTAH CODE
TITLE 78. JUDICIAL CODE
PART VI. ATTORNEYS AND COUNSELORS
CHAPTER 51. GENERAL PROVISIONS

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

Current through End of 1999 General Sess.

§ 78-51-41. Compensation--Lien

The compensation of an attorney and counselor for services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim or at the time that the attorney and client enter into a written or oral employment agreement, the attorney who is so employed has a lien upon the client's cause of action or counterclaim, which attaches to any settlement, verdict, report, decision, or judgment in the client's favor and to the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment. Any written employment agreement shall contain a statement that the attorney has a lien upon the client's cause of action or counterclaim.

As last amended by Chapter 100, Laws of Utah 1989.

WEST'S UTAH CODE

TITLE 78. JUDICIAL CODE

PART VI. ATTORNEYS AND COUNSELORS

CHAPTER 51. GENERAL PROVISIONS

Search this disc for cases citing this section.

***1178 Rules of Prof.Conduct, Rule 1.5**

WEST'S UTAH RULES OF COURT
UTAH CODE OF JUDICIAL ADMINISTRATION
PART II. SUPREME COURT RULES OF PROFESSIONAL PRACTICE
CHAPTER 13. RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Current with amendments received through 11-1-1999

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, and it is reasonably foreseeable that total attorneys fees to the client will exceed $750.00, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

*1179 (d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) A contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) The client is advised of and does not object to the participation of all lawyers involved; and

(3) The total fee is reasonable.

[Amended effective September 1, 1995.]

Comment

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established in writing, where it is reasonably foreseeable that the fees will exceed $750.00. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee but is obligated to return any unearned portion. See Rule 1.14(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

*1180 An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best

interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved. Rule 1.5(e) is not intended to prevent the sale of a law practice (including goodwill) if the sale otherwise complies with the Rules of Professional Conduct.

Disputes Over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee, as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

*1181 Code Comparison

The factors of a reasonable fee in Rule 1.5(a) are substantially identical to those listed in DR 2-106(B). EC 2-17 states that a lawyer "should not charge more than a reasonable fee...."

There was no counterpart to paragraph (b) in the Disciplinary Rules of the Code. EC 2-19 stated that it is "usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

There was likewise no counterpart to paragraph (c) in the Disciplinary Rules of the Code. EC 2-20 provided: "Contingent fee arrangements in civil cases have long been commonly accepted in the United States," but "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee...."

With regard to paragraph (d), DR 2-106(C) prohibited "a contingent fee in a criminal case." EC 2-20 provided that "contingent fee arrangements in domestic relation cases are rarely justified."

With regard to paragraph (e), DR 2-107(A) permitted division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation...." Paragraph (e) permits division without regard to the services rendered by each lawyer if they assume joint responsibility for the representation.

[Amended effective November 1, 1998.]